

1 IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
2 IN AND FOR THURSTON COUTNY

3 FUTUREWISE AND PILCHUCK AUDUBON
4 SOCIETY,

5
6 Petitioners,

7 v.

8 SNOHOMISH COUNTY,
9

10 Respondent.
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**Cause No.17-2-01367-34
(GMHB Case No. 15-3-0012c)**

**DENIAL OF
CERTIFICATE OF APPEALABILITY**

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13 **I. REQUEST FOR CERTIFICATE OF APPEALABILITY**

14 This matter came before the Growth Management Hearings Board (GMHB) on
15 Futurewise's and Pilchuck Audubon Society's (Futurewise or Petitioners) Application for
16 Direct Review and Certificate of Appealability filed March 30, 2017. Snohomish County
17 (County) filed its response on April 7, 2017.¹
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19 **II. PROCEDURAL BACKGROUND**

20 Petitioners challenged Snohomish County's adoption of Amended Ordinance No. 15-
21 034, an ordinance which amended portions of the County's critical areas ordinances.
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23 The Board conducted a Hearing on the Merits on January 17, 2017, and issued a
24 Final Decision and Order (FDO) on February 17, 2017. The challenges raised by the
25 Petitioners and addressed in the Board's FDO were much more extensive than the singular
26 issue now presented. With their motion for a certificate of appealability, the Petitioners focus
27 on one question which they phrase as follows: Does the Growth Management Act (GMA)
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¹ Snohomish County's Response to Application for Direct Review and Certificate of Appealability.

1 require jurisdictions to protect people and property on the land in addition to protecting the
2 designated critical areas?²

3 4 III. AUTHORITY AND ANALYSIS

5 The Administrative Procedure Act, RCW 34.05.518, sets forth the criteria and
6 procedures for certificates of appealability. RCW 34.05.518(3) identifies the GMHB as an
7 “environmental board,” and establishes the following criteria for a certificate of appealability:
8 (Emphasis added)

9
10 (b) An environmental board may issue a certificate of appealability if it finds
11 that **delay in obtaining a final and prompt determination of the issues**
12 **would be detrimental to any party or the public interest and either:**

13 (i) Fundamental and urgent statewide or regional issues are raised; **or**

14 (ii) The proceeding is likely to have significant precedential value.

(Emphasis added)

15 Issuance of a certificate of appealability lies within the discretion of the Board. In
16 considering the Petitioners’ application, RCW 34.05.518(4) requires a board to state in its
17 certificate of appealability “which criteria it applied [and] explain how that criteria was met.”
18 The Board reviews the request for certification in light of the criteria in RCW 34.05.518(3)(b).

19 20 A. Detrimental Delay

21 Detrimental delay is a threshold question as the Board may not issue a certificate of
22 appealability unless “delay in obtaining a final and prompt determination of the issues would
23 be detrimental to any party or the public interest.” While the Petitioners assert delay will be
24 detrimental, the Board is not persuaded. No compelling interest requires expedited
25 appellate court resolution of the Petitioners’ issue. Rather, the Board believes that the
26 additional level of review provided by the Thurston County Superior Court would prove
27 beneficial.
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32 ² Futurewise’s and Pilchuck Audubon Society’s Application for Direct Review and Certificate of Appealability at 3.

1 The Board agrees with the County's argument in regards to the question of
2 detrimental delay:

- 3 • The Board does not believe there is a difference between its regions' rulings on
4 the question posed by the Petitioners. As the County observes, the Western
5 Region's most recent decision addressing whether the GMA imposes a duty on
6 local jurisdictions to protect life and property held that it did not.³ While differences
7 may have existed at one time, that does not appear to be the case at present.
- 8 • Critical areas regulations are subject to regular updating pursuant to RCW
9 36.70A.130(1)(c). Should the courts overturn the position of the Board in regards
10 to a GMA duty to protect lives and property, that decision will necessarily control
11 when critical area regulations are next updated.
- 12 • When reviewing critical area protections, jurisdictions are required to include Best
13 Available Science (BAS). BAS is not static; as and when new or more informed
14 scientific information is developed, it will be included in critical area regulatory
15 schemes. In the County's recent critical area regulation update, its consideration
16 of BAS was reflected in its expansion of geologically hazardous areas and their
17 buffers.

18 **Conclusion:** For the reasons stated, the Board finds delay in this matter will not be
19 detrimental to any party or the public interest.

20 Notwithstanding its conclusion that the *necessary* element of detrimental delay has
21 not been met, the Board elects to comment briefly on application of the other criteria for
22 issuance of a certificate of appealability.

23 **B. Fundamental and Urgent Statewide or Regional Issues Raised**

24 Futurewise is correct that the question it poses is fundamental: whether the GMA
25 requirements to designate and protect critical areas can be expanded to find a duty to
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³ *Friends of the San Juans v. San Juan County*, GMHB No. 13-2-0012c (FDO, September 6, 2013) at 38.

1 protect people and property from critical areas.⁴ However, the Board finds that the
2 Petitioners have not demonstrated that the question posed is of an urgent statewide or
3 regional issue. Again, the Board concurs with the County's observation that the three prior
4 Growth Management Hearings Boards, as well as the three existing board regions, when
5 they have considered the question posed by the Petitioners, (with one exception which
6 appears to have been subsequently contradicted without reference) have reached similar
7 conclusions. Petitioners' argument in support of a finding of urgency consists merely of the
8 statements that jurisdictions "are in the midst" of GMA mandated CAO updates and
9 "developments may be approved that are at risk of landslides". As observed above, any
10 change in appellate court guidance will be incorporated into local jurisdictions' regular
11 critical areas ordinance updates. The Board does not agree that consideration of the
12 question is of an urgent, statewide nature.
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14 **Conclusion:** For the reasons stated above, the Board finds this matter is not of
15 urgent statewide importance.
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17 **C. Significant Precedential Value**

18 RCW 34.05.518 (3)(b) requires the Board to find that the matter *either* presents a
19 fundamental regional or statewide issue *or* is likely to have significant precedential value.
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21 The Board is unable to venture an opinion on whether or not this matter is likely to
22 have significant precedential value. Clearly, if the courts were to find a GMA duty to protect
23 people and property from geologically hazardous areas, a significant precedent would be
24 set. On the other hand, a failure to find such a duty in the GMA would merely uphold
25 conclusions reached by the Board for more than ten years.
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27 **Conclusion:** For the reason stated above, the Board is unable to determine whether
28 this matter is likely to have significant precedential value.
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⁴ RCW 36.70A.170(1)(d) and RCW 36.70A.060(2).

1 **IV. ORDER**

2 Having reviewed the application for Certificate of Appealability, the relevant
3 provisions of the Administrative Procedures Act, in particular RCW 34.05.518(3)(b), and the
4 facts of this matter, the Board concludes that the criteria for set forth in RCW
5 34.05.518(3)(b) have not been met and declines to exercise its discretion to issue a
6 certificate of appealability for direct review in Thurston County Superior Court Case No. 17-
7 2-01367-34.
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9 Entered this 18th day of April, 2017.
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11 _____
12 William Roehl, Board Member

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14 Cheryl Pflug, Board Member

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16 Deb Eddy, Board Member
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